NO. 49421-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

GUSTAVO ANDREW ALLEN, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.15-1-02116-8

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

Unpublished Cases

RESPONSE TO ASSIGNMENTS OF ERROR

I. **The search warrant affidavit contains sufficient probable cause to support the warrant. Because the warrant is valid, all evidence obtained as a result of the warrant, including Allen's statements, was properly admitted at trial.**

II. **The trial court did not abuse its discretion by requiring Allen to register as a felony firearm offender.**

III. **The State concedes that Allen's sentence on count one exceeds the statutory maximum sentence by three months. The proper remedy would be a remand for resentencing to remove three months from Allen's community custody requirement.**

STATEMENT OF THE CASE

On October 19, 2015, Washington State Patrol Trooper Philip Thoma applied for a search warrant to search the properties of 22807 NE 72nd Avenue, Battle Ground, Washington 98604 and 26001 NE 29th Avenue, Ridgefield, Washington 98642, among other locations. CP 19-27. The affidavit requested permission to search for, among other things, controlled substances, including but not limited to heroin, paraphernalia used for distribution of these substances, personal books, notes, and records used for distribution purposes, cash or currency, and weapons. CP 25-26. In the affidavit supporting the search warrant application, Trooper Thoma listed general habits of drug dealing operations that he has learned

through his training and experience. CP 20-22. The affidavit continues by detailing specific facts supporting probable cause that evidence of drug dealing activity can be found both at the Battle Ground address and at the Ridgefield address, as well as the other locations. CP 23-25. Specifically, the affidavit explains the use of a confidential informant who had participated in controlled heroin buys with the suspect of the investigation, then thought to be identified as Sanchez-Luna but later to be identified as Cruz-Pegueros. *Id.* Regarding these controlled buys, the affidavit states that in the month prior to the warrant application, Trooper Thoma observed a blue Ford Econovan at the Battle Ground residence no less than five times. CP 24. It further describes a controlled buy conducted within 72 hours of the warrant application where the subject was seen driving the Ford and that this Ford had been observed at the Battle Ground location approximately ten minutes prior to its arrival at the predetermined buy location. CP 24-25. Additionally, after the controlled buy, the Ford was followed directly to the Ridgefield address, where the suspect entered an outbuilding for several minutes, and then drove directly back to the Battle Ground address, where the suspect entered a grove of trees for several minutes before returning to the house. CP 25. The affidavit then states that within the ten days prior to the warrant application, two additional controlled buys were conducted from the suspect. *Id.* After one

of these buys, the suspect was followed from the buy directly to the Ridgefield address. *Id.*

The warrant was authorized on October 19, 2015, with a provision that it must be served within ten days. CP 28-31. On October 28, 2015, the warrant was executed and served on both the Battle Ground address and the Ridgefield address. CP 32-33.

During the execution of the warrant on the Battle Ground address law enforcement officers found a pound of methamphetamine under insulation in the attic connected to the garage. RP 108-10, 128-35, 182-83, 212. In the bathroom closest to Allen's room, they found a grinder containing heroin residue, a digital scale, a box of plastic baggies, and plastic containers that appeared to be used to process drugs. RP 147-54, 166, 216. In the closet across from the bathroom, officers found a digital scale. RP 144-46. The rest of the house contained other evidence of methamphetamine processing including Igloo coolers and a safe containing $1,600 in cash. RP 155, 168-70.

In Crus-Pegueros's bedroom, officers found an unloaded rifle and shotgun. 158-63. They found ammunition within arm's reach of the firearms as well as in the bathroom and kitchen. 160, 162, 164.

During the execution of the warrant, Allen informed the officers of the location of his bedroom in the house, admitted that he knew the drugs were in the house, and confessed to helping Cruz by picking up, processing, and delivering drugs. RP 184-95. Specifically, he stated the operation picked up methamphetamine two to three times per month, on average, containing approximately 10 to 15 pounds each. RP 194.

Allen was subsequently charged with Count 1 – Possession of a Controlled Substance with Intent to Deliver – Methamphetamine, including a school bus route stop enhancement and a firearm enhancement, and Count 2 – Possession of Controlled Substance – Heroin. CP 41-42.

At trial on June 20-22, 2016, the jury was provided with verdict forms for both counts as well as special verdict forms related to the enhancements on count one. CP 44-47. Regarding the firearm enhancement, the special verdict form asked whether "...Allen, or an accomplice, [was] armed with a firearm at the time of the commission of the crime in count 1...." CP 47. Regarding this enhancement, the jury was given jury instruction 9 defining accomplice liability and jury instruction 19 explaining the special verdict form for the firearm enhancement. CP 116, 127. Instruction 19 states "[i]f one participant in a crime is armed

with a firearm, all accomplices to that participant are deemed to be so armed, even if only one firearm is involved." CP 127. Allen did not object to any of the verdict forms or these instructions. RP 315, 317.

The jury returned verdicts of guilty on both counts and found that Allen had committed both enhancements. CP 44-47.

At sentencing, the State declined to ask for the doubling provision under 9.94A.410 leaving Allen's maximum sentence at a total of ten years. RP 462. The Superior Court imposed 51 months of confinement on count one and 6 months of confinement on count two. CP 81. To count one, the court added 36 months for the firearm enhancement and 24 months for the school bus stop enhancement for a total of 111 months. *Id.* On both counts one and two, the court sentenced Allen to 12 months of community custody bringing the total time on count one to 123 months and the total time on count two to 18 months. CP 82. The court also required Allen to register as a felony firearm offender because of the facts of the case. CP 81, 86.

Allen subsequently filed a notice of appeal on July 21, 2016. CP 109.

ARGUMENT

I. The search warrant affidavit contains sufficient probable cause to support the warrant. Because the warrant is valid, all evidence obtained as a result of the warrant, including Allen's statements, was properly admitted at trial.

This Court reviews the issue of a trial court's assessment of probable cause for a search warrant de novo. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). A review of probable cause is limited to the four corners of the search warrant affidavit. *State v. Murray*, 110 Wn.2d 706, 709-10, 757 P.2d 487 (1988).

For a search warrant to be valid under the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington State Constitution, it must be supported by probable cause. U.S. Const. Amend. 4; Wash. Const. art 1, § 7; *State v. Fry*, 168 Wn.2d 1, 5-6, 228 P.3d 1 (2010) (citing *State v. Vickers*, 148 Wn.2d 91, 108, 59 P.3d 58 (2002)). "An affidavit establishes probable cause for a search warrant if it sets forth facts sufficient to allow a reasonable person to conclude there is a probability that [an individual] is involved in criminal activity and evidence of that activity will be found at the place to be searched." *State v. Ross*, 141 Wn.2d 304, 315, 4 P.3d 130 (2000) (citing *State v. Young*, 123 Wn.2d 173, 195, 867 P.2d 593 (1994)). Thus, "probable cause requires a nexus between criminal activity and the item to be seized, and also a nexus

between the item to be seized and the place to be searched." *State v. Goble*, 88 Wn.App. 503, 509, 945 P.2d 263 (1997) (citing Wayne R. LaFave, *Search and Seizure* § 3.7(d), at 372 (3d ed. 1996)).

In determining probable cause, the judge issuing the warrant "is entitled to make reasonable inferences from the facts and circumstances set out in the affidavit." *State v. Maddox*, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004). Probable cause requires only the probability of criminal activity, not a prima facie showing that criminal activity has occurred. *Id.* at 510 (citing *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); *State v. Seagull*, 95 Wn.2d 898, 907, 632 P.2d 44 (1981)). Further, "[f]acts that, standing alone, would not support probable cause can do so when viewed together with other facts." *State v. Garcia*, 63 Wn.App. 868, 875, 824 P.2d 1220 (1992). A court should use common sense to interpret affidavits for search warrants, and resolve doubts in favor of the warrant. *State v. Partin*, 88 Wn.2d 899, 904, 567 P.2d 1136 (1977).

Allen argues the search warrant in this case lacks a sufficient nexus between criminal activity (the sale of heroin) and the place to be searched (Allen's residence). He relies primarily on *State v. Thein* and the unpublished case of *State v. Blye* to support this position. These cases are distinguishable from the situation presented here. The *Thein* court

determined a sufficient nexus has not been established between the items to be seized and the place to be searched where the warrant affidavit only contains evidence that a person involved in dealing drugs resides at the place to be searched and generalized statements about the habits of drug dealers. *State v. Thein*, 138 Wn.2d 133, 141, 148-49, 977 P.2d 582 (1999). Similarly, the *Blye* court determined that "a person's return to his or her home after engaging in illegal activity does not, by itself, establish probable cause that illegal activity will be found in the person's home." *State v. Blye*, No. 46950-2-II, 2016 WL 6216250 at *5 (October 25, 2016) (unpublished opinion) (comparing *State v. G.M.V.*, 135 Wn.App. 366, 372, 144 P.3d 358 (2006)). It further reiterates that generalized habits of drug dealers can support probable cause, but they cannot be the principle evidence connecting drug activity to a specific residence. *Id.*

The facts of this case do not directly relate to the holdings of *Thein* and *Blye* because there is significantly more evidence of drug activity in the Battle Ground residence beyond the mere presence of a drug dealer and the drug dealer's return to the residence after engaging in illegal activity. In addition to information about the habits of drug dealers, the affidavit in this case states information about surveillance of a blue Ford Econovan before, during, and after one of the controlled drug buys conducted by a confidential informant. Specifically, the warrant affidavit

details that the Ford was seen at the Battle Ground residence no less than five times within one month prior to the affidavit. It goes on to describe that during a controlled buy within 72 hours of the affidavit, the subject was seen driving the Ford and that this Ford had been observed at the Battle Ground location approximately ten minutes prior to its arrival at the predetermined buy location. Additionally, after the controlled buy, the Ford was followed directly to the Ridgefield address, where the suspect entered an outbuilding for several minutes, and then drove directly back to the Battle Ground address, where the suspect entered a grove of trees for several minutes before returning to the house.[1] These details provide a sufficient nexus between the items to be seized (evidence of drug dealing activity to include drugs, drug paraphernalia, and money) and the Battle Ground address.

This case more closely aligns with the facts present in *State v. Mejia* and *State v. G.M.V.*

[1] Allen assigns error to the Superior Court's ruling on review of probable cause because it concluded that there were two other controlled buys where the suspect was followed directly to the Ridgefield address and then the Battle Ground address. The State agrees that those facts are not consistent with the warrant affidavit (within ten days of the affidavit there were two additional controlled buys and in one instance the suspect was followed directly to the Ridgefield address). Because this court reviews the sufficiency of probable cause in this circumstance de novo, and the warrant affidavit contains sufficient evidence as detailed above, any inconsistency should not affect this Court's bearing on the determination of whether probable cause exists within the four corners of the warrant affidavit to search the Battle Ground residence.

The search warrant affidavit in *State v. Mejia* detailed information regarding a confidential informant's contact with a middleman to purchase cocaine. *State v. Mejia,* 111 Wn.2d 892, 894, 766 P.2d 454 (1989). It described two controlled buys where the middleman was observed driving directly to the residence after leaving the pre-arranged location where a drug transaction was initiated by the exchange of money. The middleman then left the residence and returned directly to the pre-arranged location where he again contacted the informant and delivered the cocaine. *Id.* at 895-96. From these facts, the court determined that it was reasonable to infer that the middleman acquired cocaine from the residence based on his conduct alone. *Id.* at 900.

In *State v. G.M.V.*, law enforcement obtained a search warrant for a residence based on information that they had watched the suspect leave the residence for a meeting with a confidential informant, followed him to the buy location, and then followed him back to the house. *State v. G.M.V.,* 135 Wn.App. 366, 369, 144 P.3d 358 (2006). The suspect was also seen returning to the house after one other controlled buy where he had first come to the controlled buy from a different direction. *Id.* In ruling that there was a sufficient nexus establishing probable cause that drugs could be found in the residence, the court determined that *Thein* is distinguishable. *Id.* at 372. It noted that the affidavit in *Thein* was "based

solely on evidence of drug activity elsewhere" and that the affidavit before the court did not rely on generalized beliefs of drug dealer's habits. *Id.* The court specifically highlighted that the warrant was for the purpose of searching the place where the suspect had "left from and returned to before and after he sold drugs." *Id.* The court concluded that this activity establishes a sufficient nexus between evidence of drug dealing and the residence. *Id.*

Like the affidavits supporting search warrants in *Mejia, supra* and *G.M.V., supra*, the affidavit here establishes that the suspect was leaving from and seen returning to the Battle Ground residence before and after one of the controlled buys with the confidential informant. Although the affidavit does not establish that the suspect was followed from the Battle Ground address to the controlled buy, because the Ford was seen at the address ten minutes prior to the buy and the suspect appeared at the buy location driving the Ford, this Court can make a reasonable inference that he left from that address and drove to the buy location. Under *State v. G.M.V., supra*, this information establishes a sufficient nexus between evidence of drug dealing and the Battle Ground residence. In fact, the unpublished opinion relied on by Allen, *State v. Blye, supra*, indicates the sufficiency of this nexus when it cites to *State v. G.M.V., supra* to compare the difference between a suspect merely returning to a residence after a

controlled buy and an observation that a suspect left from and returned to a residence before and after a controlled buy. *Blye*, 2016 WL 6216250 at *5.

Allen also questions the legality of service of the search warrant because of the time between the observations in the affidavit and the execution of the warrant as well as law enforcement's determination that the confidential informant identified the incorrect Department of Licensing photo for the suspect. It appears that Allen does not assign separate error to these issues, but uses them as support for the argument that the affidavit provides an insufficient nexus. Regardless, these arguments are unpersuasive. The warrant was served within the ten-day time limit proscribed by the judge issuing the warrant, thus complying with that requirement. Determining the specific identity of the suspect also does nothing to cast doubt on the accuracy of the warrant affidavit – the affidavit details that the suspect, regardless of his name, was seen completing the controlled buy, driving the vehicle present at the Battle Ground residence ten minutes prior to the buy, and followed back to the Battle Ground residence after a short stop in Ridgefield after the buy. The identity of the suspect does not change the probable cause that the Battle Ground address is connected with evidence of drug dealing activity.

Because the affidavit supporting the search warrant establishes a sufficient nexus between evidence of drug dealing and the Battle Ground address, the trial court correctly denied Allen's request to suppress all evidence gathered as a result of the warrant's execution. This evidence includes both physical evidence of drug dealing activity and the statements Allen made to law enforcement. Therefore, this Court should affirm the decision of the Superior Court and deny Allen's request to overturn his conviction.

II. The trial court did not abuse its discretion by requiring Allen to register as a felony firearm offender.

Under RCW 9.41.330, a court must consider whether to require a defendant convicted of a felony firearm offense to register under RCW 9.41.333. The decision to impose such a requirement is discretionary with the trial court and, as such, is reviewed for abuse of discretion. *Id.*; *State v. Miller*, 159 Wn.App. 911, 918, 247 P.3d 457, *review denied*, 172 Wn.2d 1010 (2011) (discretionary decisions are reviewed for abuse of discretion). Abuse of discretion exists only where the decision was "'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *Miller,* 159 Wn.App. at 918 (quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). "A decision is based on untenable grounds or made for untenable reasons if it rests on facts

unsupported in the record or was reached by applying the wrong legal standard." *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (internal citations omitted).

In deciding whether to impose a registration requirement after a defendant is convicted of a felony firearm offense, a court considers the defendant's criminal history, whether he has been previously found not guilty of an offense by reason of insanity, evidence of the defendant's propensity for violence that would likely endanger others, and other factors relevant to the court. RCW 9.41.330(2) (the statute makes it clear that a court is not limited to considering only the enumerated factors).

Here, the Superior Court did not abuse its discretion by requiring Allen to register as a felony firearm offender. The court had authority to require registration because the jury found that Allen, or an accomplice, was armed with a firearm during the commission of the crime of possession of methamphetamine with intent to deliver when it answered the special verdict form relating to the firearm enhancement. Further, on the judgement and sentence paperwork, the court noted that considering the facts of the case, a registration requirement was appropriate.

Allen argues that the jury must have found that he was literally armed with a firearm in order for the court to have lawfully imposed the registration requirement. He contends that it's an abuse of discretion to

require registration where the jury could have found that Allen's accomplice, rather than Allen himself, was armed. However, he fails to cite to any case law or statutory authority that would support this position. Instead, he attempts to simply rely on the wording of jury instruction number 19 and the definition of "felony firearm offense" found in RCW 9.41.010(8) without mention to accomplice liability. Contrary to Allen's argument, an individual has committed a felony firearm offense when an accomplice is armed with a firearm because of the principle of accomplice liability.

A person is guilty of a felony firearm offense, where that person was armed with a firearm in the commission of the offense. RCW 9.41.010(8)(e). Allen stops his analysis with this statute. However, read in conjunction with other statutes and the jury instructions, RCW 9.41.010(8)(e) is subject to accomplice liability.

Turning to the firearm enhancement, the statute explicitly states that the enhancement applies where the offender or an accomplice was armed with a firearm. RCW 9.94A.533(3). Further, jury instruction number 19 (relating to the firearm enhancement) and jury instruction number 9 (relating to accomplice liability) indicate that where one individual is armed with a firearm, all accomplices are armed as well. Because these were the instructions presented to the jury without

objection, they are the law of the case. *See State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). Thus, because an individual's sentence is subject to a firearm enhancement where an accomplice, and not literally the individual himself, was armed with a firearm, there was no error in findings Allen guilty of a felony firearm offense based off of the jury's affirmative answer to the special verdict form for the enhancement.

Because the trial court had lawful authority to impose the registration requirement, this Court should deny Allen's request to remand for resentencing on this ground.

III. The State concedes that Allen's sentence on count one exceeds the statutory maximum sentence by three months. The proper remedy would be a remand for resentencing to remove three months from Allen's community custody requirement.

Count one – Possession of a Controlled Substance with Intent to Deliver – Methamphetamine is a Class B felony under RCW 69.50.401(2)(b). As such, any sentence including imprisonment and community custody cannot exceed 120 months. *Id.*; RCW 9A.20.021(1)(b); RCW 9.94A.701(9).

In this case Allen was sentenced to 111 months of confinement with 12 months of community custody, which exceeds the statutory maximum sentence by 3 months. As a remedy, the State agrees this Court

should remand for resentencing to remove three months from the community custody portion of Allen's sentence.

CONCLUSION

For the reasons stated above, this Court should affirm the ruling of the Superior Court that the search warrant was supported by probable cause and determine that admitting the discovered physical evidence and statements at trial was not error. This Court should also uphold the Superior Court's decision to require Allen to register as a felony firearm offender.

Because Allen's sentence exceeds the statutory maximum by three months, the State agrees this Court should remand for resentencing to remove the excess from Allen's community custody requirement.

DATED this 5th day of July 2017.

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